

LAW OFFICES OF MARC J. WODIN

Marc J. Wodin, Esq. - SBN 79573
Elana Bitton, Esq. - SBN. 130835
23901 Calabasas Road, Suite 1076
Calabasas, California 91302
Telephone (818) 595-3490
Fax (818) 225-7497
e-mail marc_wodin@wodinlaw.com

Attorneys for Defendant CONSECO SENIOR HEALTH INSURANCE COMPANY

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

PAMELA THOMPSON, Individually)
and as Personal)
Representative of CHARLES)
THOMPSON, Deceased,)

Plaintiff,

vs.

CONSECO SENIOR HEALTH)
INSURANCE COMPANY, a)
Pennsylvania corporation,)
DOES 1 through XX)

Defendant(s).

CASE NO.: C 07-05437 PJH
[Sonoma County Superior
Court Case No. 241544]

**DECLARATION OF MARC J. WODIN
RE DEFENDANT'S MOTION FOR AN
ORDER COMPELLING MEET AND
CONFER AND/OR ENFORCING
SETTLEMENT ETC.**

**DATE: October 29, 2008
TIME: 9:00 a.m.
CTRM: 3**

**[FILED CONCURRENTLY WITH
MOTION TO CHANGE TIME]**

Assigned to the Honorable
Phyllis J. Hamilton

DECLARATION OF MARC J. WODIN

I, MARC J. WODIN, DECLARE:

1. The facts set forth herein are personally known to
declarant, who has firsthand knowledge of the same, and if called
as a witness, said declarant could and would competently testify

1 thereto under oath.

2
3 2. I am an attorney duly admitted to practice before this
4 court, and I am a principal in the Law Offices of Marc J. Wodin,
5 attorneys of record for defendant Conseco Senior Health Insurance
6 Company ("Conseco") in the above entitled action.

7
8 3. I have been practicing as an attorney in California since
9 1978. I practiced in California State Courts, and in all of the
10 Federal District Courts, in California. Over the years, I have
11 personally attended hundreds of mediations, in cases pending in
12 both State and Federal Court. I have also served as a court
13 appointed mediator. I have knowledge of the process of mediation,
14 including the process which is commonly followed when a
15 settlement is reached at a mediation, in actions pending in both
16 California State and Federal Courts, as hereinafter set forth.

17
18 4. When a settlement is reached at a mediation, it is often
19 not feasible to then and there prepare a comprehensive settlement
20 agreement. To make the settlement binding, the parties and their
21 attorneys often sign a brief memorandum, setting forth essential
22 terms, in cursory, bullet point, form, with a proviso that a
23 settlement agreement - the formal document with the provisions,
24 terms and language appropriate to such - will be prepared
25 thereafter, usually by the defendant, which is seeking to "buy
26 its peace," and reasonably wants provisions, terms and language,
27 which will accomplish that purpose, to its satisfaction. In such

1 circumstances, it is common for defendant's attorney to provide a
2 proposed agreement to the plaintiff's attorney, and for the
3 attorneys to meet and confer to resolve any differences that may
4 arise on the language.

5
6 5. On January 31, 2008, the court issued an order, referring
7 this matter to mediation. Attached hereto as Exhibit 1 is a true
8 and correct copy of the Order.

9
10 6. On February 14, 2008, the court issued a Notice of
11 Appointment of Mediator, notifying the parties that attorney John
12 Koeppel, of the Law Office of Ropers, Majeski, Kohn & Bentley,
13 210 Spear Street, Suite 1000, San Francisco CA 94105, was
14 assigned as the mediator. Attached hereto as Exhibit 2 is a true
15 and correct copy of the Notice.

16
17 7. A mediation was scheduled for May 29, 2008, at the
18 mediator's office, and went forward on that date, and at that
19 place. The following persons attended the mediation, in addition
20 to Mr. Koeppel: plaintiff Pamela Thompson; attorney Michael P.
21 Guta, of the Law Offices of John E. Hill, attorneys for
22 plaintiff; Steven Huffer, Associate General Counsel for defendant
23 Consec Senior Health Insurance Company, and; myself, as attorney
24 for defendant Consec Senior Health Insurance Company

25
26 8. A settlement was reached at the mediation. A one page
27 memorandum was prepared, with the word "Thompson" at the top, and

1 which set forth essential terms of the settlement, in cursory,
2 bullet point form, as follows:

3
4 Defendant will pay plaintiff and her attorneys \$17,500.

5
6 Plaintiff will dismiss the entire action with
7 prejudice.

8
9 There will be no further claims made under the policy.

10
11 Plaintiff and her attorneys will execute a release and
12 settlement agreement provided by defendant which will include a
13 provision for confidentiality.

14
15 The settlement is enforceable pursuant to CCP §664.6.

16
17 The memorandum was signed and initialed by Ms. Thompson, Mr.
18 Guta, Mr. Huffer, and myself, at the time of the mediation.

19 Attached hereto as Exhibit 3 is a true and correct copy of
20 the memorandum.

21
22 9. At the mediation, plaintiff's attorney asked when the
23 settlement check could be provided. After speaking with Mr.
24 Huffer, I told him that it was anticipated that the check could
25 be provided within several weeks of my receipt of the executed
26 Agreement and the Dismissal.

1 10. On June 2, 2008, the mediator filed a Certification of
2 ADR Session, stating that the case settled at the mediation.
3 Attached hereto as Exhibit 4 is a true and correct copy of the
4 Certification.

5
6 11. On June 5, 2008, the court issued an Order of Dismissal,
7 dismissing the action without prejudice, which dismissal would be
8 vacated, and the action restored to the calendar, if any party
9 certified to the court, within 60 days, that agreed upon
10 consideration for the settlement had not been delivered over.
11 Attached hereto as Exhibit 5 is a true and correct copy of the
12 Order

13
14 12. On June 16, 2008,¹ I wrote to plaintiff's attorney,
15 enclosing a Release and Settlement Agreement ("the Agreement") -
16 Consecoco's standard Agreement, modified in certain respects for
17 the particularities of the settlement, with provisions, terms and
18 language, stated with particularity, usual and appropriate to
19 such a document ² - and a Dismissal. Attached hereto as Exhibit 6

20 _____
21 ¹The process was delayed, for several weeks, by the failure
22 of plaintiff's attorney to respond to telephonic requests from me
23 and my associate for information as to how the settlement check
was to be made payable, to be included in the Agreement, which
information was finally received on June 16, 2008.

24 ² e.g., the identification of the document, the parties, the
25 action, and statement of the fact of settlement; the amount of
26 payment to be made by and who it would be made to; a timetable
27 for plaintiff to provide the executed Agreement and Dismissal,
and for defendant to make payment; that defendant was not
responsible for paying any other sums; that defendant was not be
responsible to taxing authorities for any tax liability incurred

1 is a true and correct copy of the letter, Release and Settlement
2 Agreement and Dismissal.

3
4 13. On June 20, 2008, I received a letter from plaintiff's
5 attorney, in which he said that he had "concerns" with the
6 language of two of the provisions (a provision which provided for
7 liquidated damages in the event of breach of the confidentiality
8 provision, and a venue provision). Attached hereto as Exhibit 7
9 is a true and correct copy of the letter.

10
11 14. I promptly faxed a letter to plaintiff's attorney,
12 saying that I was "happy to discuss" any "changes" he wanted to
13 make in language, and requesting, that he "please call" so that
14 we could do so. Attached hereto as Exhibit 8 is a true and
15 correct copy of the letter. ^{3 4}

16 _____
17 by plaintiff related to the payment; that no further benefits
18 would be paid under the policy; the terms of release; that
19 plaintiff would dismiss the action with prejudice; plaintiff's
20 authority to file the action and dismiss it; that the settlement
21 was not an admission of liability; that plaintiff was not
22 entering into the settlement based on any representation of
23 defendant; that plaintiff was over the age of 18, had read the
24 Agreement, and was acting after securing the advice of counsel;
25 that if any part of the Agreement was held to be invalid, it
26 would not effect the remaining portions; confidentiality of the
27 settlement and facts and circumstances of the action; venue; that
28 this was the entire agreement; that the parties would do such
acts as might reasonably be required to carry out the Agreement;
that each party and their attorneys had reviewed the Agreement,
and the rule of ambiguities was not applicable; that the
Agreement could not be modified except in writing signed by the
parties; that the Agreement could be executed in parts.

³ "If there are provisions of the release which you wish to
have changed, as seems to be the case, then please call me, and I

1 15. Plaintiff's attorney did not respond to my request.

2
3 16. On June 27, 2008, I faxed a second, follow up, letter to
4 plaintiff's attorney, noting that I had not heard from him, and
5 stressing that we needed to resolve matters related to the
6 language of the release. Attached hereto as Exhibit 9 is a true
7 and correct copy of the letter. ⁵

8
9 17. Plaintiff's attorney did not respond to this letter,
10 either.

11
12 18. After waiting another week, on July 3, 2008, I faxed a
13 third letter to plaintiff's attorney, again noting that I had not

14 _____
15 will be happy to discuss them with you. You mention some things
16 in your letter. However, I cannot tell whether those are the only
17 things you have a question about, and it makes no sense to do
18 this on a piecemeal basis."

19 ⁴At the mediation, plaintiff's attorney asked when the
20 settlement check could be provided. I told him that it was
21 anticipated that the check could be provided within several weeks
22 of my receipt of the executed Agreement and the Dismissal.

23 In his letter of June 20, 2008, plaintiff's attorney said
24 that it was his understanding that the settlement check would be
25 received within 2 weeks of the mediation, and complained that it
26 had not been provided.

27 In my responsive letter of June 20, 2008, I reminded
28 plaintiff's attorney that what he was told, at the mediation, was
that the check could be provided within a few weeks of his
providing the executed Agreement and Dismissal. Further, it was
plaintiff's attorney who had caused a delay, by failing to
provide requested information concerning the payee on the
settlement check, which delayed completion of the Agreement.

⁵ "I have not heard back from you in response to my letter of
June 20. We need to resolve matter related to the release
language.

1 received a response, and again asking him to contact me, so we
2 could resolve issues related to the release language. Attached
3 hereto as Exhibit 10 is a true and correct copy of the letter. ⁶
4

5 19. Once again, plaintiff's attorney did not respond.
6

7 20. Rather, eleven days later, plaintiff's attorney wrote,
8 asserting a new position (inconsistent with the position
9 expressed in prior letter, that he only had a concern
10 about two of the provisions of the Agreement). He now asserted:

11 1. that the five sentence memorandum prepared at the
12 mediation was the settlement agreement, and that document, with
13 those five sentences, as the only document, and all that could be
14 said, to express the terms of settlement - there could be no
15 comprehensive settlement agreement with provisions, terms and
16 language, such as were contained in the Release and Agreement
17 provided by me to him.

18 2. The only additional thing to be done, according to
19 plaintiff's attorney, was to physically affix to the five
20 sentence memorandum, several sentences of language concerning
21 release and confidentiality, as demanded and phrased by him.
22 Attached hereto as Exhibit 11 is a true and correct copy of the
23
24

25 _____
26 ⁶ "I have now written two letters to you concerning resolving
27 issues related to the release, to which I have received no
28 response. I have the settlement check. Again, please contact me
so we can resolve these issues."

1 letter.⁷

2
3 21. On July 17, 2008, I faxed a letter to plaintiff's
4 attorney, expressing strong disagreement with his assertions:

5 - Agreements for settlement are interpreted under the rules
6 applicable to contracts generally, one of which is that
7 they are interpreted to express the mutual intent of the parties,
8 which is determined from an objective consideration of the
9 language of the document and the circumstances under which it was
10 prepared.

11 - The reasonable interpretation of the language of the
12 memorandum, and consideration of the circumstances under which it
13 was prepared, is consistent with the preparation of comprehensive
14 Release and Settlement Agreement, with provisions, terms and
15 language appropriate to such a document:

16 The parties reached a settlement at a private mediation. It
17 was not feasible to then and there prepare a comprehensive,
18 formal agreement. Common to such a circumstance, a cursory,
19

20 ⁷ As discussed hereinafter, the Agreement provided by me to
21 plaintiff's attorney contained language of release, which set
22 forth, with particularity, the releasee, the releasor, and the
23 matters released. Plaintiff's attorney demanded that the language
24 of release consist of a sentence, which said something about some
unidentified releasor being released from some vague and

25 Likewise, the Agreement contained language of
26 confidentiality, which set forth, with particularity, what was
27 encompassed as being confidential, and who and under what
28 circumstances confidential matters could and could not be
disclosed. Plaintiff's attorney demanded that the that language
of confidentiality consist of one sentence, which said that the
terms of settlement were confidential.

1 bullet point memorandum was prepared, and signed by the parties,
2 to make the settlement binding, with an express proviso that
3 defendant would thereafter provide a Release and Settlement
4 Agreement. It is reasonable that the Release and Settlement
5 Agreement would include provisions, terms and language
6 appropriate to such a document, the preparation of such a
7 document is consistent with the wording of the memorandum and the
8 circumstances under which it was prepared, and there is nothing
9 in the language, or those circumstances, which is inconsistent
10 with such a thing.

11 - His assertion that the five sentence memorandum is the
12 Agreement was contrary to the language of the memorandum. The
13 memorandum doesn't say that it is the Release and Settlement
14 Agreement. It says defendant will be providing a Release and
15 Settlement Agreement.

16 - The memorandum does not state that the Agreement can only
17 consist of a literal recitation of the five, bullet point
18 sentences, set forth in the memorandum. In fact, it doesn't place
19 any limitations on the provisions, terms or language of the
20 Agreement, other than to say that it will contain a provision for
21 confidentiality.

22 - For the same reasons set forth above, his assertion that
23 the five sentence memorandum is the Agreement, and that the
24 Agreement cannot contain anything other than a literal recitation
25 of the five, bullet point sentences, set forth in the memorandum,
26 is inconsistent with a consideration of the circumstances under
27 which the memorandum was prepared.

1 - His assertion was inconsistent with his own prior letter,
2 wherein he said that he only had a problem with the language of
3 two of the provisions of the Agreement.

4 - The memorandum said that defendant would provide language
5 of Release. The Agreement provided by defendant contains language
6 of release, which sets forth, with particularity, the releasee,
7 the releasor, and the matters released.⁸ Defendant has the right
8 to have language of release which was full, complete, and
9 reasonable. Plaintiff's demand that the language of release
10 consist of a single sentence of release, which says something

11
12 ⁸ "3. As consideration for the payment of the sums specified
13 in paragraph 1, Plaintiff does hereby release, acquit and forever
14 discharge the Released Parties, of and from any and all claims,
15 demands, disputes, losses, or causes of action, known or unknown,
16 foreseen or unforeseen, in law or in equity, which the Plaintiff
17 has, has ever had, may ever have, or which may hereafter accrue
18 or be acquired, against the Released Parties, relating to or
19 concerning the Policy, and any claims which were or could have
20 been asserted in the Action. Plaintiff further covenants and
21 agrees that neither she nor anyone authorized to act on her
22 behalf will commence, authorize, or accept any benefit from any
23 judicial or administrative action or proceeding, other than as
24 expressly provided for in this Agreement, against the Released
25 Parties, or any of them, in either their personal or corporate
26 capacity, with respect to any claim, matter, or issue that in any
27 way arises from, is based on, or relates to any alleged loss,
28 harm, or damages allegedly caused by the Released Parties, or any
of them, in connection with the released claims referenced in
this paragraph and paragraph 5 of this Agreement."

"4. The release and covenant not to sue set forth in
paragraph 3 above specifically includes, but is not in any way
limited to: (a) any and all claims against the Released Parties
on account of, arising out of, or in any way relating to the
Policy; (b) any and all claims against the Released Parties on
account of, arising out of, or in any way relating to the Action;
(c) any damages which were or could have been claimed in the
Action including, but not limited, any extra-contractual damages
suffered at any time by reason of any of the conduct alleged in
the Action, or the continued effects thereof, or as referenced in
(a) and (b) of this paragraph."

1 about some unidentified releasor being released from some
 2 unspecified matters related to a misidentified insurance policy,
 3 was vague, incomplete, and essentially meaningless.⁹

4 - The memorandum said that defendant would provide a
 5 provision for confidentiality. Defendant has the right to have
 6 language of confidentiality which was full, complete, and
 7 reasonable. The Agreement provided by defendant contains
 8 language of confidentiality, which sets forth, with
 9 particularity, what is encompassed as being confidential, and who
 10 and under what circumstances confidential matters could and could
 11 not be disclosed.¹⁰ The single sentence of confidentiality

12
 13 ⁹ "Releasor Pamela Thompson acknowledges and agrees that this
 14 release applies to all claims that Releasor may have against
 15 Releasee [nowhere defined] arising out of Transport Life
 16 Insurance company Policy of Insurance No. 1101-CA [which is not
 17 a correct identification of the subject policy] for injuries,
 damages, or losses to Releasor's personal and property, real or
 18 personal [whatever that means], whether those injuries, damages
 19 or losses are known or unknown, foreseen or unforeseen, or patent
 20 or latent [whatever that means]."

21 ¹⁰ "16. Plaintiff and her attorneys in the Action agree that
 22 the terms of this Agreement (including but not limited to the
 23 amount of the payment recited herein and the basis on which said
 24 payments are computed), the nature and circumstances of the
 25 dispute between the parties, and the factual background of the
 26 Action, are confidential. Plaintiff and her attorneys in the
 27 Action further understand and agree that while each may state
 28 that a settlement has been reached, except as provided in this
 paragraph, they may not disclose confidential information, to
 third parties, orally or in writing.

Confidential information shall not be disclosed, revealed,
 or divulged, by plaintiff or her attorneys, to any person, firm,
 corporation, news media, or to any other entity whatsoever, with
 the following exceptions, and then only to the extent reasonably
 necessary: (a) to governmental taxing authorities; (b) to
 plaintiff's and her attorneys' accountants and tax preparers; (c)
 when required by order or a court of competent jurisdiction or
 otherwise compelled by law, or; (d) with the prior written

1 demanded by plaintiff's attorney - that the terms of the
2 settlement are confidential, is even more vague, incomplete, and
3 meaningless that his demanded language of release ¹¹ It doesn't
4 even say what confidentiality is, or means - i.e. that
5 confidential information cannot be disclosed. It doesn't
6 encompass plaintiff's attorney. Further, it doesn't encompass the
7 facts and circumstances of the case.¹²

8 I concluded the letter requesting, for the fourth time, that
9 we meet and confer in an attempt to resolve these issues.¹³

10 Attached hereto as Exhibit 12 is a true and correct copy of
11 the letter.

12
13 22. Once again, plaintiff's attorney did not respond to my
14 request.

15
16 _____
17 consent of all parties.

18 No party or their attorneys shall categorize this Agreement
19 or the outcome of the Action as a victory for themselves, or a
20 defeat of the other party, or suggest that this Agreement, or the
21 terms thereof, constitute something other than the settlement of
22 a dispute without an admission or finding of liability on the
23 part of either party.

24 The promises of confidentiality as provided in this
25 paragraph are material inducements to Defendant to enter into
26 this Agreement and are of the essence of this Agreement."

27 ¹¹ "The parties agree that the terms of the settlement are
28 confidential."

¹² I told plaintiff's attorney, at the mediation, that
confidentiality would encompass the settlement and the facts and
circumstances of the action.

¹³ "I continue to be open to discussing modification of the
release and settlement agreement which I provided to you, if you
have some problem with the specific language therein."

